



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-55/56449

PRELIMINARY RECITALS

Pursuant to a petition filed January 15, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the St. Croix County Dept. of Human Services in regard to medical assistance, a hearing was held on February 19, 2003, at New Richmond, Wisconsin.

The issue for determination is whether the petitioner is ineligible for medical assistance as the result of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Sherry Bonte, ESS
St. Croix County Dept Of Human Services
1445 N. Fourth Street
New Richmond, WI 54017-1063

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien

Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of St. Croix County.
2. The petitioner and her husband signed a warranty deed on February 22, 1993 that transferred their house and related property to their children. They retained the right to occupy the property, but those rights "shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons."
3. The petitioner's husband died at some point prior to the hearing.

4. The petitioner entered the nursing home on June 12, 2002. At that time her interest in the property ended.
5. The petitioner was born on August 14, 1923. She was 79 years old when she entered the nursing home.
6. The fair market value of the property in question is \$131,000.
7. The petitioner was found eligible for institutional medical assistance on November 15, 2002. However, on January 6, 2003 the county agency reversed its determination and found that she was eligible only for MA card services because she divested a life estate interest in the property upon entering the nursing home.

DISCUSSION

A person seeking medical assistance is ineligible if her assets exceed \$2,000. §49.47(4)(b)3g, Wis. Stats. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months, although longer periods exist for trusts. §49.453(1)(f), Wis. Stats. Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets over the asset limit by the statewide average monthly cost to a private pay patient in a nursing home. §HFS 103.065(5)(b), Wis. Adm. Code; §49.453(3), Wis. Stats.; *see also*, *MA Handbook*, App. §14.5.0. This amount is now \$4,542 per month. *BHCE/BWP Operations Memo*, No. 03-05; *MA Handbook*, Appendix, §14.5.0.

The petitioner and her husband signed a warranty deed on February 22, 1993 that transferred their property to their children. They retained the right to occupy the property, but those rights “shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons.” Her attorney argues that her interest had no value because it was less than that found in a life estate. He points out that it would be difficult to assign a value to it because it would be almost impossible to sell on the open market.

These arguments fail to convince me. §HFS 103.06(6) defines "life estate" as a “claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including the income from the property in his or her lifetime.” The petitioner has the right to live on and use the property during her lifetime. While the deed allows certain circumstances to end this right before her life ends, there is no clear time when those circumstances occur: Under what circumstances does the right end when it is unfeasible for only one party to live in the house? Under what circumstances does the right end when it is unfeasible for both parties to live in the house? What is meant by unfeasible? Who determines when this standard is met? The deed does not mention a doctor or guardian. What are the circumstances other than health that could make it unfeasible for them to live in the house?

Even if the petitioner’s attorney drafted the deed more carefully, I would find that she retained a life estate. Despite her current attorney’s attempt at distinction, there is no practical difference between the interest held by the petitioner and any other life estate. Property is only valuable to a person when it can be used. The petitioner’s lawyer designed the deed to allow the petitioner to retain the property as long as she could use it. Thus the only distinction between a regular life estate and the remainder estate established here is that the one here was set up to avoid using the property to pay for the petitioner’s medical costs. This directly contradicts the policy behind establishing the divestment laws and regulations. The contention that the petitioner could not sell her interest is a diversion. Life estates are rarely sold because their purpose is to allow a person to have a place to live while transferring the main property right to another,

who is almost always a close relative. The real value of the retained right is not what it is worth to some third party, because a third party is rarely contemplated, but rather what living on the property is worth to the grantor of the deed. This is clearly true here. When the petitioner and her husband executed the deed they obviously intended to give all their rights to the property to their children after they (the petitioner and her husband) could no longer live on it. Further, the value of the property interest that the petitioner's children received when their mother entered the nursing home is the same as it would be if she had retained a regular life estate when executing the deed and then given up that interest when she went into the nursing home. Because there is no practical difference to either the petitioner or her children between an interest that allows the petitioner to live on the property for the rest of her life and one that allows her to live there as long as she is able to do so, the value of the interest divested is that of a life estate.

Left unanswered is the amount of the divestment. The county agency found that the petitioner divested \$79,283.82. It arrived at this figure by assuming that the property's value is \$131,000 and that the divestment occurred when the petitioner was 70 years old, which is how old she was when she signed the deed. The property's value is unchallenged. However, if the divestment occurred when the petitioner was 70 it does not affect her medical assistance because more than three years have passed since then. This is incorrect because she did not give up the remainder of her life estate until she entered the nursing home in 2002. She was then almost 79 years old. The value of a life estate is determined by multiplying the value of the estate by a multiplier found at *MA Handbook*, Appendix, §30.2.0. For person who is 79 years old, the multiplier is .45357, which then multiplied by the \$131,000 value of the property results in a divestment of \$59,417.67. When this is divided by the \$4,542 monthly cost of nursing home care, it results in 13 months of ineligibility.

The petitioner raised one other objection to finding her ineligible. She contends that the county agency should be estopped from removing her from medical assistance because her attorney relied upon an earlier definition of a life estate when drafting the deed. As the petitioner's current attorney points out, estoppel occurs when one party performs an action that another party relies upon and as a result commits some action to its detriment. The definition of a life estate has not changed in recent years. Rather, the county agency corrected an incorrect interpretation of that definition. There is no evidence that the earlier attorney relied upon the county's prior interpretation, or even that the county agency was using that interpretation when the attorney drafted the deed. Because the definition has not changed and there is no evidence that the petitioner relied upon an incorrect interpretation of the definition, there was nothing different for the petitioner's attorney to rely upon to his detriment.

CONCLUSIONS OF LAW

1. The petitioner held a life estate in the property she lived in until she entered the nursing home.
2. The petitioner divested \$59,417.67 when entered the nursing home and gave up her remaining interest in the property.

NOW, THEREFORE, it is

ORDERED

That this matter is remanded to the county agency within instructions that within 10 days of the date of this decision it shall find that the petitioner is ineligible for institutional medical assistance for 13 months from the date that she entered the nursing home. In all other respects the decision of the county agency is upheld.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as “PARTIES IN INTEREST.”

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other “PARTIES IN INTEREST” named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Eau
Claire, Wisconsin, this 9th day of April,
2003

/sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
86/MDO